

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 06-0138P
Use Tax-Penalty
For the Years 2002-2003**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Tax Administration—Penalty

Authority: Ind. Code § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is a corporation engaged in retail clothing sales. Taxpayer operated two stores in Indiana during the periods in question.

Taxpayer was audited for sales and use tax for the periods in question. Taxpayer had no changes with respect to sales tax on its retail sales, use tax on its capital purchases, and use tax on its store expenses. However, Taxpayer did not remit use tax on certain promotional items such as catalogs, postcards, and brochures. Taxpayer was assessed use tax, interest, and penalty on the promotional items. Taxpayer protested only the penalty on the assessment.

Taxpayer's letter of protest indicated that Taxpayer waived its right to hearing. Because of the waiver of Taxpayer's hearing, the letter of findings is based on the information in the file. Additional facts will be supplied as necessary.

I. Tax Administration—Penalty

DISCUSSION

Taxpayer protests the imposition of the ten percent negligence penalty for the taxes that the Department has imposed.

Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. Ind. Code § 6-8.1-10-2.1. The Indiana Administrative Code further provides:

(b) “Negligence” on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

(c) The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

45 IAC 15-11-2.

Taxpayer argues that the total assessment represented only a small percentage of Taxpayer's overall sales and use tax liability for the years in question. While the failure to self-assess use tax on a small percentage of a taxpayer's overall liability is not necessarily determinative on the issue of negligence, Taxpayer's compliance with Indiana tax laws in its operations—its minimal failure to remit use tax was in an area of law subject to some difference in interpretation—established that it acted with ordinary business care with respect to its duties.

FINDING

Taxpayer's protest is sustained.